



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 12, 2004

Mr. Reagan E. Greer  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR2004-6840

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207076.

The Texas Lottery Commission (the "commission") received a request for information relating to video lottery and the hiring of a specific subcontractor. Although you raise no exceptions to disclosure on behalf of the commission, you assert that the release of Exhibits C and D may implicate the proprietary interests of the Texas Racing Agri-Industry Council (the "council") and Granite Crest LLC ("Granite Crest").<sup>1</sup> Accordingly, you notified the council and Granite Crest of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances).

In response to the request for information regarding the subcontractor, the commission submitted, as Exhibit C, records detailing the skills, experience, and method of work and practices of Granite Crest's manager, William H. Watson. Granite Crest responded to your notice by arguing that this information is excepted from disclosure under sections 552.102, 552.107, and 552.110 of the Government Code. In response to the request for information regarding the video lottery, the commission submitted, as Exhibit D, a report prepared for

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<sup>1</sup>Although the commission initially sought to withhold the records submitted as Exhibit B under sections 552.107 and 552.111 of the Government Code, you inform this office that you have released these records to the requestor.

the council. The council argues that the report and certain attachments are excepted from disclosure under section 552.110 of the Government Code. We have considered the submitted arguments and have reviewed the information at issue.

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). This section applies to information in the personnel file of an employee of a governmental body. Granite Crest argues that the commission created a "personnel file" with Exhibit C when it evaluated the subcontractor's ability to perform the required tasks. The commission does not, however, raise this exception to disclosure nor does it give us any indication that the information in Exhibit C is maintained within one of its personnel files. Accordingly, we find that section 552.102 does not apply to Exhibit C.

Granite Crest also argues that Exhibit C is protected under the attorney-client privilege. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Because the privilege belongs to the client, the commission, the client entity in this instance, must assert the privilege. *See* Open Records Decision No. 676 (2002) (discussing scope of attorney-client privilege). Since the commission does not raise section 552.107, this exception is not applicable to Exhibit C. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, Gov't Code § 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general).

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which states a "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the

business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it is shown that the information meets the definition of a trade secret and the necessary factors are demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary

showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing Granite Crest's arguments and the submitted records, we find that the information contained in Exhibit C does not meet the definition of a trade secret. *See Open Records Decision No. 319 (1982)* (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). Furthermore, Granite Crest has failed to demonstrate that the release of Exhibit C will cause the company substantial competitive harm. Accordingly, Exhibit C must be released. On the other hand, we find that the council has demonstrated that the release of most of the information in Exhibit D will cause that entity substantial competitive harm. We have marked the information in Exhibit D that the commission must withhold under section 552.110(b). Since the council has failed to demonstrate that the remaining portions of Exhibit D are protected under section 552.110, we conclude that information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

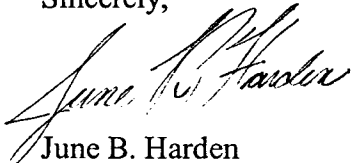
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 207076

Enc: Submitted documents

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